STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2008
v	No. 275085 Wayne Circuit Court
ERIC DAVID LACKEY, Defendant-Appellant.	LC No. 06-008307-01

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He also pleaded nolo contendere to two counts of second-degree fleeing or eluding a police officer, MCL 257.602a(4), two counts of failing to stop at the scene of an accident resulting in serious injury, MCL 257.617, two counts of felonious driving, MCL 257.626c, and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 1 to 20 years each for the CCW, felon in possession, and failure to stop convictions, 43 months to 20 years for each of the fleeing or eluding convictions, and 1 to 15 years each for the felonious driving and resisting or obstructing convictions, to be served consecutively to a two-year prison term for the felony-firearm conviction. He appeals by right, challenging his convictions for CCW, felon in possession of a firearm, and felony-firearm. We affirm.

At trial, Police Officer Maureen Whitten testified that while on patrol at approximately 12:15 a.m., she saw the driver of a vehicle "have something pointed out the window, what appeared to be a gun." It was pointed at two males on the sidewalk. She shined her vehicle's spotlight on it and then observed what she "believed [] to be a black handgun." The window was open. A chase ensued. When the vehicle stopped, Whitten saw the driver, whom she identified as defendant, exit and flee. The passenger, Glenn Rogers, remained in the car. Defendant was eventually apprehended after a foot chase that lasted five or six minutes. The police were unable to find a weapon.

Whitten's partner, Gregory Tourville, testified that he observed defendant with his arm extended out the window and holding a handgun that was pointed at two pedestrians on the sidewalk. Tourville believed that the gun "was a silver or what we would call nickel-plated automatic style weapon."

Rogers testified for the defense. He denied seeing a gun in defendant's hand or in the car. Upon questioning by defense counsel, Rogers admitted that he gave a prior statement to the police in which he claimed to have seen defendant with a black semiautomatic handgun. Rogers told the police that defendant pulled the gun from under his seat, pointed it at another man and said, "'I'll kill one of you mother f--kers.'" Rogers testified at trial that everything in his statement was true except for the information about the gun. He claimed that one of the police officers had hit him in the face after pulling him from the car and that he was scared when he gave the statement because another officer warned him that he would face a lengthy period of incarceration. He testified that he "made up anything to get out of there." On cross-examination, the prosecutor read lengthy portions of Rogers' prior statement into the record and asked Rogers to confirm the questions asked and their answers.

Investigator Samuel Mackie testified in rebuttal concerning the circumstances under which Rogers provided his statement. When the prosecutor moved to admit Rogers' written statement into evidence, defense counsel noted, "Judge, it's all been admitted into evidence." The trial court stated that it was admitted for the purpose of impeaching Rogers and "will be admitted for that purpose only."

On appeal, defendant first challenges the sufficiency of the evidence supporting his convictions for CCW, felon in possession, and felony-firearm, arguing that the evidence did not establish that what he allegedly possessed was a "firearm." He notes that there was no evidence concerning the caliber, the means of propulsion, or the characteristics of the barrel.

This Court reviews de novo a challenge to the sufficiency of the evidence at a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Both officers Whitten and Tourville testified that they saw defendant pointing a handgun. This testimony viewed in a light most favorable to the prosecution was sufficient to establish defendant's possession of a "firearm" for purposes of the felon in possession and felony-firearm convictions. The prosecution was not required to produce the weapon, and the definition of "firearm" does not require operability of the weapon. *People v Peals*, 476 Mich 636, 642, 656; 720 NW2d 196 (2006).

Defendant further argues that the trial court improperly relied on Rogers' prior statement as substantive evidence to find that defendant possessed a firearm.

Defendant was not required to object to the trial court's findings to preserve this issue for appellate review. MCR 2.517(A). Questions of law and questions involving the application of the law to the facts are reviewed de novo. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996).

The parties do not dispute that Rogers' prior out-of-court police statement was not admissible as substantive evidence, MRE 801, but rather was admissible only to impeach

Rogers' inconsistent trial testimony that defendant did not possess a gun.[1] Moreover, when the statement was offered at trial, the trial court agreed that it was admitting it for the purpose of impeaching Rogers and that it "will be admitted for that purpose only." Nonetheless, the trial court's findings of fact indicate that the statement was likely considered as substantive evidence, that is, not only to evaluate Rogers' credibility as a witness, but also as corroborative evidence of Officer Whitten's observations. In its findings, the trial court stated:

> Now, he testified similarly to a black gun, which is consistent with Whitten's testimony about a black gun. . . .
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> * * *
>
> So far as the testimony is concerned and the evidence, I've had the opportunity to evaluate the credibility of the witnesses, and in this particular case credibility of Whitten is primarily significant because she's insistent that that was a black gun and almost appeared to be insulted on cross-exam that there was any question that it was not a black gun because she had a spotlight on it. And then you've got Rogers describing the weapon as a black gun and there is some consistency there.
>
> The only issue to be decided in this case is whether there was a handgun in the car as it relates to the additional charges. The court finds, based upon the evidence presented, that the defendant is guilty. . . .

Although the trial court properly could consider Rogers' prior police statement in evaluating whether Rogers' contradictory trial testimony was credible, it was improper to consider the statement as corroboration for Officer Whitten's testimony that she believed that she saw a black handgun. Nonetheless, the issue is whether sufficient evidence was presented to support a finding that defendant possessed a handgun. Both Whitten and Tourville testified that they saw defendant pointing a handgun. Thus, even without considering Rogers' statement as substantive evidence that defendant had a gun, the remaining evidence when viewed in a light most favorable to the prosecution was sufficient to support the conclusion that defendant did, in fact, possess a gun.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

[1] Defendant does not challenge the admissibility of the statement for impeachment purposes. See *People v Kilbourn,* 454 Mich 677, 682-683; 563 NW2d 669 (1997).